Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	CC Docket No. 99-273
	)	
Provision of Directory Listing Information	)	
Under the Communications Act of 1934,	)	
As Amended	)	
	)	
The Use of N11 Codes and Other Abbreviated	)	CC Docket No. 92-105
Dialing Arrangements	)	
	)	
Administration of the North America	)	CC Docket No. 92-237
Numbering Plan	)	

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

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SUMMARY

There is scant support in the record for regulatory intervention by the Commission to disrupt existing arrangements between Commercial Mobile Radio Service providers and their directory assistance vendors. For the wireless industry, a DA "equal access" provision is a solution in search of a problem. There is no legal or policy justification for imposing a new, pointless and unfunded mandate on wireless carriers, particularly when the CMRS market is under heavy financial challenge.

The 1996 Telecommunications Act plainly stated that CMRS carriers are not local exchange carriers and the Commission confirmed that ILEC and LEC landline legacy regulations should not apply to CMRS carriers. In the absence of any explicit legal requirement, CMRS carriers are free to use their own business judgment in good faith to order their business affairs, including making the determination of how to provide directory assistance to best meet the needs of their customers.

Indeed, only one commenter, Metro One, argued that an "equal access" requirement on CMRS carrier-provided directory assistance could have any benefit and that commenter sought CMRS regulation out of concern that ILEC affiliated CMRS carriers might somehow undermine potential ILEC equal access to directory assistance regulations. Obviously Metro One misunderstands the composition and nature of the CMRS market and ignores the benefits CMRS subscribers realize under the present framework which features a highly competitive CMRS market where carriers compete on the basis of service coverage, price and features, such as advanced directory assistance services. CMRS customer churn is a fact of life in the CMRS marketplace and a strong indicator that customers switch CMRS carriers if they are unhappy with the bundle of services provided. Choice in the CMRS market already exists.

This same approach should govern the Commission's consideration of the desirability of requiring CMRS carriers to perform billing and collection functions for competitive directory assistance providers. In 1999 the Commission declined to require ILECs to provide billing and collection for CMRS carriers to offer calling party pays. It is difficult to imagine why the Commission would ignore its precedent there but create a new regulatory obligation here, where the benefits of a competitive directory assistance market are not obvious and no consumers are clamoring for a choice of CMRS directory assistance providers.

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REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby files reply comments in the above-captioned proceeding.[1] The Notice of Proposed Rulemaking examines the asserted need for additional regulations in the retail directory assistance ("DA") market. DA providers, typically toll DA providers, are concerned that incumbent local exchange carriers have a uniquely advantageous position in providing DA to their subscribers. To remedy this, many DA providers seek universal 411 dialing parity or that other forms of access obligations be applied to all local exchange carriers.[2]

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[1] Provision of Directory Listing Information Under the Communications Act of 1934, as amended, *et al.*, *Notice of Propose Rulemaking*, FCC 01-384, CC Docket No. 99-273, released January 9, 2002 ("*Notice*").

[2] *See, e.g.,* Comments of Premiere Network Services, Inc.; Comments of Infonxx, Inc. and Comments of Telegate, Inc. Metro One is the only commenter that would also impose new DA access obligations on mobile wireless carriers as well. *See* Comments of Metro One Telecommunications, Inc. at 5.

The *Notice* seeks comment on whether the Federal Communications Commission ("Commission" or "FCC") should require wholesale changes to the manner by which incumbent Local Exchange Carriers ("ILECs") provide retail DA to their customers, and whether those measures ought to apply to wireless carriers as well.[3] As to wireless service providers, there is no legal or factual predicate for the proposed requirement nor policy rationale that would justify the costly, commercially disruptive and unfunded mandate identified in the *Notice*.

I. INTRODUCTION

Extension of any new DA regulation to Commercial Mobile Radio Service ("CMRS") providers is contrary to the regulatory and economic philosophy embraced by the Commission generally, as well as for the CMRS industry in particular.[4] It also ignores the challenging economic conditions of the wireless marketplace and cannot be sustained on either a legal or a policy basis. Such a mandate is unwarranted and would raise the rates of customers with no demonstrated public interest benefit.

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[3] *Notice* at ¶ 40. Nextel limits these reply comments to this aspect of the proposal.

[4] The Commission is very cautious about intervening in markets, particularly where there is no statutory requirement for such intervention. As FCC Chairman Powell has stated, "the FCC must thoughtfully distinguish between a true market failure, and what is simply hard or challenging.....[i]n struggling through the challenge, it will be common for some to want to try and leap ahead by securing government assistance. Market failure might demand a government response, but market challenges should be left to market players. . . . . [t]he market is the best vehicle designed by mankind for innovation, for technology change and evolution. I would caution we review fully the lessons of economic history to deepen our appreciation of that fact." FCC Chairman Michael Powell, Address to the National Summit on Broadband Deployment, *Speech*, (Oct. 25, 2001). Chairman Powell also has stated "I am committed to building policy that is centered around market economics." FCC Chairman Michael Powell, Address to the Federal Communications Bar Association, *Speech*, (June 21, 2001).

Nextel, for example, is already employing substantial resources implementing numerous federal mandates, including E911, number pooling, number porting and CALEA, to name a few. In the aggregate, the combined cost is very substantial. Other mandates, such as contribution to federal and state universal service funds, TRS, and Numbering Administration, impose real costs on wireless service providers, and by extension, on their subscribers and these costs can create regulatory disparity among competing wireless service providers.

The Commission must assess existing mandates and their effect on CMRS carriers' ability to provide long-term, viable facilities-based competition.[5] In particular, the Commission must find that adoption of a new mandate can be justified on a cost/benefit basis.[6] The talismanic invocation of the general benefits of competition will not suffice. For the wireless market, "competitive" provision of DA is a solution in search of a problem. The Commission's resources would be far more productively employed by rejecting this proposal immediately.

As the *Notice* itself acknowledges, CMRS carriers are not subject to interexchange equal access obligations or other landline legacy regulatory requirements that apply to LECs.[7] Any

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[5] *See e.g.,* Comments of Nextel Communications, Inc., CC Docket 96-45 (filed April 22, 2002). In the context of universal service, Nextel has pointed out that federal mandates can disproportionately impact certain industry segments, creating undesirable market distortions and competitive disparities.

[6] *See, e.g., California v. Federal Communication Commission*, 39 F.3d 919, 923 (1994) (vacating and remanding a portion of a Commission decision that eliminated structural separation between basic and enhanced services because the FCC failed to adequately explain its conclusions regarding the prevention of access discrimination through open network architecture). The court ultimately determined that the Commission's cost benefit analysis was superficial and flawed and the regulatory result was thus arbitrary and capricious. *Id.*

[7] *See* 47 U.S.C. § 332(c)(8) (CMRS carriers "shall not be required to provide equal access to common carriers for the provision of telephone toll services."); *Notice* at ¶12.

change to this approach would require the Commission to reverse its long-standing and successful policy of facilitating a competitive marketplace for wireless communications services. This about-face would be justified only if a market failure supported the action. No commenter herein has demonstrated either any legal or policy basis to suggest the Commission ought to treat CMRS carriers as LECs, or that any market failure in the CMRS market that should prompt Commission action.

II. METRO ONE TELECOMMUNICATIONS MISUNDERSTANDS THE WIRELESS MARKET

Only one commenter, Metro One Telecommunications, supports the imposition of "equal access" DA regulation on CMRS carriers. Metro One asserts that CMRS 411 dialing parity and presubscription obligations would promote DA competition in the landline market.[8] Metro One's position is based upon a misunderstanding of the wireless market. First, Metro One appears to believe that the wireless industry is a monolith of carriers that offer the same services the same way. The Commission, of course, knows otherwise.[9]

Nextel is one of six wireless carriers that competes nationally for customers. Nextel has over nine million customers, and its subscriber base is predominantly business users. In additional to digital cellular services, Nextel offers Direct Connect, a dispatch-type service that

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[8] See Comments of Metro One Telecommunications, Inc. at 5. Metro One is a toll DA provider that supports strong regulatory intervention, initially to require dialing parity for toll DA providers, then to mandate alternate dialing patterns and then finally to require ILECs and wireless providers to offer billing and collection services for competing retail DA providers such as Metro One.

[9] *See* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Sixth Report*, 16 FCC Rcd 13350 (2001) (*Sixth Report*).

allows instantaneous one-to-many communication. In contrast, other CMRS carriers serve other market segments. AT&T Wireless, for example, has an estimated subscriber base of approximately 18 million[10] and is aggressively promoting a mass market data and voice service offering known as "m-life." Just as the Commission envisioned, CMRS carriers have differentiated themselves through coverage, marketing and the services they provide, including DA services. There is no reason or market failure requiring the Commission to intervene, dictate or micromanage those choices now.

Inexplicably, Metro One believes the CMRS industry is the alter ego of the ILECs, with virtually all wireless carriers working in league with ILEC affiliates to protect ILEC landline monopolies. This characterization of the wireless market is not only fancifully misbegotten, it is harmful to CMRS providers such as Nextel that provide an array of services that fulfill the mobile communications needs of business persons as well as the needs of the wider mobile communications market.

Indeed, Nextel has battled with ILECs for years to gain the benefits of reasonable interconnection and reasonable access to ILEC facilities. These battles continue to this day.[11] The idea that Nextel abets any claimed anti-competitive strategies of ILECs in the DA market or in any other market is nonsense. Moreover, Nextel is not the only major CMRS provider that is

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[10] *See* AT&T WIRELESS, INC., 2001 ANNUAL REPORT 1 (2002).

[11] Nextel supports pro-competitive telecommunications policies, such as the adoption of bill and keep compensation for local traffic exchanged with ILECs and the expansion of ILEC Unbundled Network Element obligations to include special access circuits furnished to CMRS carriers to connect CMRS base stations and switches. *See e.g.,* Comments of Nextel Communications, Inc., CC Docket 01-92 (filed August 8, 2001); Reply Comments of Nextel Communications, CC Docket 01-92 (filed November 5, 2001); Comments of Nextel Communications, Inc., CC Docket 01-338 (filed April 5, 2002).

(continued...)

not an ILEC affiliate. AT&T Wireless and VoiceStream are independent wireless providers and in many instances, the policies of Verizon Wireless, Cingular Wireless and Sprint PCS vary from those of their ILEC affiliates. Thus, Metro One's sweeping assumption concerning the makeup of the competitive wireless market and its assumptions regarding the motivations of CMRS competitors is demonstrably false and cannot form the basis for any CMRS mandate.

Second, Metro One asserts, without evidence, that CMRS carrier DA service arrangements somehow block choice by CMRS subscribers. However, wireless carrier DA service arrangements are only one of a set of features that CMRS carriers offer to differentiate their services from those of other CMRS providers. Nextel's DA service offers its subscribers advanced, feature rich functionality.[12] Subscribers in the CMRS market have other choices if they are displeased with the DA and other services offered by their carrier of choice. Indeed, there is substantial annual customer churn, which means that customers are free to "vote with their feet" and to leave a CMRS carrier that is not providing a menu of services responsive to that customer's needs.[13] Thus, there is no competitive problem which requires any remedy, and certainly not the drastic remedy of "equal access" to DA to CMRS customers. Finally, CMRS carriers typically have long-term contracts in place with DA vendors that reflect the priorities of

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(..continued)

[12] Nextel has arrangements with a DA vendor to provide Nextel branded DA services. These services go beyond simple directory assistance, and include concierge services such as providing movie times, restaurant information and reservations, driving directions and similar forms of assistance.

[13] The Commission is well aware that customer churn in the CMRS market is substantial. Most wireless carriers report churn rates between 1.5 percent and 3 percent a month. *See Sixth Report,* 12 FCC Rcd at 13372 .

the carrier and the service vendor. The CMRS market has a history of responding to consumer needs and there is no lack of alternative CMRS service providers for consumers to select. Therefore, disrupting these existing DA service arrangements and mandating CMRS "equal access" to DA is unwarranted.[14]

Notwithstanding this, Metro One baldly asserts that "it is in the public interest to afford wireless carrier subscribers the same choice of DA toll services provider [sic] as is afforded to wireline customers."[15] Metro One's preferred policy, standing alone, does not justify regulatory intervention. The comments demonstrate no consumer interest in wireless carrier provision of wireless DA on an equal access basis. There is no demonstration in the record of any market failure in the wireless market with respect to the choices consumers have for DA service. Thus, there is no policy basis for Commission action.

III. THERE IS NO LEGAL BASIS TO IMPOSE DIRECTORY ASSISTANCE REGULATION ON WIRELESS CARRIERS

The single proponent of wireless presubscription, Metro One, in its comments, suggests that the Commission's plenary authority over numbering matters, as well as Section 251(b)(3) of the Act "requires all local exchange companies 'to provide dialing parity to competing providers of telephone exchange and telephone toll service.'" Metro One states that this provision offers an ample legal basis for Commission action.[16]

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[14] In fact, the Commission would have to address how carriers should recover their costs of rearranging their networks, terminating DA service arrangements and the like. The fairest result in this case would be to recover the costs from the cost causers, competitive DA providers.

[15] Metro One Comments at 9.

[16] *Id.*

Metro One's assertion ignores entirely the regulatory classification conferred upon CMRS services under the Telecommunications Act of 1996. There, the Congress created a several-tiered statutory framework that imposed the greatest degree of regulatory oversight of and affirmative obligations upon, ILECs, with a lesser degree of regulatory obligation on competitive LECs and a different, and even less regulated framework, on CMRS carriers. Congress also determined that CMRS carriers should not be classified as competitive LECs, but rather as telecommunications service providers. Indeed, the Telecommunications Act of 1996 grandfathered statutory changes made in 1993, creating the CMRS regulatory category and preempting state public service commission regulation of CMRS rate and market entry. CMRS carriers are not local exchange carriers.[17]

The dialing parity requirements of Section 251(b)(3) apply by their express terms only to local exchange carriers. They do not apply to CMRS carriers. The Commission would have to expand the scope of CMRS carrier obligations beyond those contained in the Act to require CMRS carriers to provide landline dialing parity. Not only would such an action be counterproductive, it would make no sense.

The Commission's precedent in the absence of a legal requirement is plain. CMRS carriers are free to use their business judgment in good faith to order their commercial affairs, including in this case, the relationships they maintain with DA service vendors for the benefit of

[17] In the Commission's first *Local Competition Order* it confirmed this reading of the statute. Furthermore, the Commission stated that attempts to treat CMRS carriers as LECs for regulatory purposes violated the statute and the Commission's rules. *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order,* 11 FCC Rcd 15499, 15517 (1996) (subsequent history omitted).

CMRS subscribers. Unless and until the Commission makes a finding under Section 201 that some rule or regulation is warranted, CMRS carriers are able to use their best business judgment to offer their subscribers DA services in the manner they conclude best serves their subscriber's needs.[18]

IV. THE COMMISSION DECLINED TO REQUIRE BILLING AND COLLECTION IN FAR MORE COMPELLING CIRCUMSTANCES

Several commenters suggested that ILECs can or should be compelled to provide competitive DA providers with billing and collection services. Only Metro One, however, argued that it would be desirable or appropriate for the Commission to require CMRS providers to offer alternative DA providers with billing and collection services. Metro One's comments assert that the landline ILEC monopoly can best be attacked by imposing a billing and collection requirement on all ILECs and by extension, on all wireless carriers. Metro One's apparent theory is that wireless carriers ought to shoulder this burden because otherwise they may be used as alter egos by their landline affiliates to avoid any ILEC billing and collection obligation.[19]

Plainly, the application of an all wireless "competitive safeguard" of billing and collection to Nextel and many other non-ILEC affiliated CMRS carriers would be arbitrarily overbroad. It flies in the face of Commission precedent on ILEC billing and collection

[18] In the context of inter-carrier interconnection, for example, the Commission concluded that it is "confident that the decision of interconnection 'where warranted' is best left to the business judgment of the carriers themselves." *See* Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *Second Notice of Proposed Rulemaking*, 10 FCC Rcd 10666, 10685 (1995).

[19] Metro One Comments at 7-9, 24-26.

obligations and overlooks the crucial fact that CMRS carriers are not LECs and have no regulatory obligation to provide billing and collection.[20]

The Commission has for many years looked skeptically at demands that ILECs be required to provide billing and collection to parties with competing or even complimentary services. The Commission largely deregulated ILEC billing and collection services in the 1980s.[21] Since then, the Commission has not expanded ILEC obligations to provide these services to any third parties beyond those specifically required by statute. As a result, ILECs have been free to exercise their business judgment to select those parties for whom they are willing to provide billing and collection services.

One recent case illustrates the Commission's approach to billing and collection. In a 1999 proceeding to explore CMRS calling party pays ("CPP") services, many CMRS carriers urged the establishment of regulations to facilitate their offering of CPP services, including a requirement that ILECs provide billing and collection of their customers who call CMRS calling party pays subscribers.[22] The Commission ultimately terminated the proceeding without

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[20] Metro One's assertion that the Commission has the power under Section 201 of the Act to require this action is correct, but that assertion overlooks the critical threshold issue of whether such a requirement would be in the public interest. Similarly, Metro One's suggestion that 332(c)(8) also provides a basis for action as to CMRS has the same flaw. The statute allows the Commission to act only after determining that an access regulation would be in the public interest.

[21] In 1986, the Commission detariffed billing and collection services. *See* Detariffing of Billing and Collection Services, *Report and Order*, 102 F.C.C.2d 1150 (1986).

[22] *See, e.g.* Comments of Nextel Communications, Inc., WT Docket 97-207 (filed September 17, 2001); Comments of Cellular Telecommunications Industry Association, WT Docket 97-207 (filed September 17, 2001); Comments of the Personal Communications Industry Association, WT Docket 97-207 (filed September 17, 2001).

adopting rules, observing that CPP service already was a permissible service under the Commission rules.[23] While the Commission cited the unresolved question of ILEC billing and collection for calling party pays, it declined to address how CMRS carriers would offer calling party pays where the basic service offering is infeasible without the cooperation of ILECs in providing billing and collection.[24] Thus, the Commission did not order ILECs to provide CMRS carriers with billing and collection, even where failing to do so rendered widespread CPP service infeasible.

If the Commission was unwilling to take the step of requiring non-discriminatory billing and collection to assist CMRS carriers in establishing a service that might have competed more effectively with landline local services, it is hard to imagine that in these more remote circumstances the Commission would take the unprecedented steps urged by Metro One. Metro One's suggestion should be rejected.

V. CONCLUSION

No commenter demonstrated any reason for the Commission to consider loading a pointless but expensive additional mandate on wireless carriers. CMRS carriers compete on price and on the services they offer. Imposing any form of DA equal access would be disruptive of the commercial arrangements CMRS carriers have in place and would confuse CMRS customers who are not clamoring for equal access to competitive DA alternatives. There is no

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[23] The Commission also noted that many CMRS carriers had, in the interim, introduced "bucket of minute" flat fee pricing plans, which appeared "to offer consumers many of the same benefits we identified as potential benefits of calling party pays." Calling Party Pays Service Offering in the Commercial Mobile Radio Services, *Memorandum Opinion and Order on Reconsideration and Order Terminating Proceeding*, 16 FCC Rcd 8287, at 8304 (2001).

[24] *Id.* at 8300, 8303.

legal or policy predicate to creating a new obligation on CMRS carriers, who already face enormous challenges in implementing existing mandates in a hostile financial market.

Respectfully submitted,

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April 30, 2002

CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a legal secretary at Drinker Biddle & Reath LLP do hereby certify that on this 30 day of April, 2002, a copy of the foregoing "REPLY COMMENTS", was hand delivered to each of the following:

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